In the Supreme Court of the United States.

OCTOBER TERM, 1909.

P. M. CHILDERS, APPELLANT, v. R. W. MCCLAUGHRY, WARDEN OF THE United States Penitentiary at Leavenworth, Kans.	No. 110.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The Oklahoma Enabling Act was approved June 16, 1906 (34 Stat., 267). Seventeen months later, November 16, 1907, the State was admitted into the Union (35 Stat., 2160).

The appellant, Childers, was indicted October 21, 1906, in the United States court for the Northern District of the Indian Territory, for having, on August 6, 1906, and within the jurisdiction of said court, murdered one Lena Atwood (Rec., 5). He was tried and convicted and, on June 17, 1907,

sentenced to "be imprisoned in the penitentiary situated at Fort Leavenworth, Kansas, for the term and period of his natural life at hard labor" (Rec., 6–7). He was committed accordingly, and received at the United States penitentiary at Leavenworth, Kans., by the warden, R. W. McClaughry, on June 21, 1907 (Rec., 9).

It will be observed that the facts stated as to the commission, prosecution, and punishment of the crime all occurred between the passage of the Enabling Act and the admission of the State.

On November 29, 1907, after the admission of the State, Childers filed a petition for a writ of habeas corpus in the United States District Court for the district of Kansas (Rec., 1, 10).

The principal ground of the petition was, in substance, that the United States Court in Indian Territory had no jurisdiction of the offense committed by Childers during the interim between the passage of the Oklahoma Enabling Act and the admission of the State, this contention being based upon section 14 of the Enabling Act. Other minor errors, not jurisdictional, were alleged which will be hereafter noted.

The petition was denied (Rec., 11), and from that judgment an appeal was taken to this court.

STATUTES.

The Oklahoma Enabling Act, approved June 16, 1906 (34 Stat., 267, 275–7), provides:

> SEC. 13. That said State *when admitted as aforesaid* shall constitute two judicial districts, to be known as the eastern district of Oklahoma and the western district of Oklahoma; the said Indian Territory shall constitute said eastern district and the said Oklahoma Territory shall constitute said western district. * * * The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. * * *
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> SEC. 14. That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this act in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed.
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> SEC. 15. That all appeals or writs of error taken from the supreme court of Oklahoma

Territory, or the United States court of appeals in the Indian Territory to the Supreme Court of the United States or the United States Circuit Court of Appeals for the Eighth Circuit, previous to the final admission of such State shall be prosecuted to final determination as though this act had not been passed. And all cases in which final judgment has been rendered in such Territorial appellate courts which appeals or writs of error might be had except for the admission of such State may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Circuit Court of Appeals under the provisions of existing laws. * * *

SEC. 16. That all causes pending in the supreme and district courts of Oklahoma Territory and in the United States courts and in the United States court of appeals in the Indian Territory arising under the Constitution, laws, or treaties of the United States, or affecting ambassadors, ministers, or consuls of the United States, or of any other country or state, or of admiralty or of maritime jurisdiction, or in which the United States may be a party, or between citizens of the same State claiming lands under grants from different States; and in all cases where there is a controversy between citizens of said Territories prior to admission and citizens of different States, or between citizens of different States, or between a citizen of any State and citizens or subjects of any foreign state or country, and in which cases of diversity of citizenship there shall be more than two

thousand dollars in controversy, exclusive of interest and costs, shall be transferred to the proper United States circuit or district court for final disposition. * * *

SEC. 17. That all cases pending in the supreme court of said Territory of Oklahoma and in the United States court of appeals in the Indian Territory not transferred to the United States circuit and district courts in said State of Oklahoma shall be proceeded with, held, and determined by the supreme or other final appellate court of such State as the successor of said Territorial supreme court and appellate court, subject to the same right to review upon appeal or error to the Supreme Court of the United States now allowed from the supreme or appellate courts of a State under existing laws. Jurisdiction of all cases pending in the courts of original jurisdiction in said Territories not transferred to the United States circuit and district courts shall devolve upon and be exercised by the courts of original jurisdiction created by said State.

SEC. 18. That the supreme court or other court of last resort of said State shall be deemed to be the successor of said Territorial appellate courts. * * *

SEC. 19. That the courts of original jurisdiction of such State shall be deemed to be the successor of all courts of original jurisdiction of said Territories. * * *

SEC. 20. That all cases pending in the district courts of Oklahoma Territory and in the United States courts for the Indian Territory at

the time said Territories become a State not transferred to the United States circuit or district courts in the State of Oklahoma shall be proceeded with, held, and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma and United States courts for the Indian Territory. * * *

SEC. 21. That the constitutional convention may by ordinance provide for the election of officers for a full state government, including members of the legislature and five Representatives to Congress. * * * Such state government shall remain in abeyance until the State shall be admitted into the Union and the election for state officers held, as provided for in this act. * * *

The act of March 4, 1907 (34 Stat., 1286), amended sections 16, 17, and 20 of the Oklahoma Enabling Act so as to read as follows:

SEC. 16. That all civil causes, proceedings, and matters pending in the supreme or district courts of Oklahoma Territory, or in the United States courts or United States court of appeals in the Indian Territory, arising under the Constitution, laws, or treaties of the United States, * * * shall be transferred to the proper United States circuit or district court established by this act, for final disposition, and shall therein be proceeded with in the same manner as if originally brought therein. * * *

Prosecutions for all crimes and offenses committed within the Territory of Oklahoma or in the Indian Territory, pending in the district

courts of the Territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such Territories as a State, which, had they been committed within a State, would have been cognizable in the Federal courts, shall be transferred to and be proceeded with in the United States circuit or district court established by this act for the district in which the offenses were committed in the same manner and with the same effect as if they had been committed within a State. Prosecutions for all such offenses committed within either of said Territories and pending in the supreme court of the Territory of Oklahoma, or in the United States court of appeals in the Indian Territory, upon the admission of such Territories as a State, shall be transferred to the United States circuit courts created by this act for the district within which the offense was committed * * *.

SEC. 17. That all causes, proceedings, and matters, civil or criminal, pending in the supreme court of the Territory of Oklahoma, or in the United States court of appeals in the Indian Territory, not transferred to the United States circuit or district courts in said State of Oklahoma shall be proceeded with, held, and determined by the Supreme Court or other final Appellate Court of such State as the successor of said supreme court of the Territory of Oklahoma and of the United States court of appeals in the Indian Territory, subject to the same right to review upon appeal or writ of error to the Supreme Court of the United

States now allowed from the supreme or final appellate court of a State under existing laws.

SEC. 20. That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States courts in the Indian Territory at the time said Territories become a State, not transferred to the United States circuit or district courts in the State of Oklahoma, shall be proceeded with, held, and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma, and the United States courts in the Indian Territory. * * * All criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States Circuit or District Courts in the State of Oklahoma, shall be prosecuted to a final determination in the State courts of Oklahoma under the laws now in force in that Territory.

ARGUMENT.

The appeal should be dismissed for want of jurisdiction in this court.

This is an appeal direct from the District Court, which can only be sustained under the authority of section 5 of the act of March 3, 1891 (*In re Lennon*, 150 U. S., 393). The jurisdiction of the District Court was not in issue, nor, properly speaking, is the construction or application of the Constitution involved in the case. The real question before the District Court was whether the United States Court for the Northern District of the Indian Territory had jurisdiction of the offense for which petitioner was undergoing punishment, in view of the provisions of the Oklahoma Enabling Act. The allegation in the petition that the petitioner had been deprived of his liberty without due process of law is based entirely upon the alleged want of jurisdiction in the United States court of the Indian Territory to try him for the offense. The question before the lower court was simply one of statutory construction, not of the unconstitutionality of the statute in question.

The case is on all fours with *In re Lennon*. Lennon had been committed for contempt by the Circuit Court for the Northern District of Ohio, and,

thereupon, applied to the same court for a writ of habeas corpus, the petition alleging, as in this case, that he was restrained of his liberty in violation of the Constitution, and that the Circuit Court had no jurisdiction to commit him. The writ was refused, and a direct appeal taken to this court. After pointing out that the jurisdiction of the Circuit Court to issue a writ of habeas corpus was not in issue, but that jurisdiction was entertained, as in this case, the court, speaking by Chief Justice Fuller, said (150 U. S., 400–401):

> Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the statute, on the contention that the petitioner was deprived of his liberty without due process of law. The petition does not proceed on any such theory, but entirely on the ground of want of jurisdiction in the prior case over the subject-matter and over the person of petitioner, in respect of inquiry into which the jurisdiction of the Circuit Court was sought. If, in the opinion of that court, the restraining order had been absolutely void, or the petitioner were not bound by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the Circuit Court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from

> that judgment directly to this court would not, therefore, lie on the ground that the application of the Constitution was involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner.

The opinion of the court on this point is quoted with approval by Mr. Justice White in *Cosmopolitan Mining Company* v. *Walsh* (193 U. S., 460).

On the Merits.

I.

The peculiar wording of section 14 of the Enabling Act is made the basis of the appellant's contention that, after the passage of that act and until the admission of the State, although its admission was entirely problematical, Congress intended that all prosecutions for crimes or offenses committed in the Indian Territory or the Territory of Oklahoma during the interim should be suspended, as well as the prosecution of all crimes and offenses committed prior to the passage of the act in which no indictments had been found. Undoubtedly, such contention finds some support in the language of that section, but it is so contrary to practical common sense and the plain intent of the statute taken as a whole, and so inimical to the safety of the people of such territories, that it must necessarily be rejected.

The other provisions of the Enabling Act above set forth with reference to the transfer of pending causes

to the Federal and State courts from the courts of the Territory of Oklahoma and of the Indian Territory plainly negative the idea that Congress had any such intention. They provided (sec. 16) for the transfer to the United States circuit and district courts of all causes of a Federal nature, both civil and criminal, pending in the United States courts in the Indian Territory, as well as in the courts of the Territory of Oklahoma, at the time of the admission of the State, and for the succession by the courts of the State to all pending causes, civil or criminal, which were not so transferred (secs. 17, 20).

While Congress provided for the separation of pending cases, transferring to the Federal courts those of a Federal nature and to the State courts those of a local nature, both as to cases pending in the courts of the Indian Territory and as to those pending in the courts of the Territory of Oklahoma, the appellant is contending for a construction of section 14 which would require all criminal cases of whatever character arising in the Indian Territory during the transition period, or arising before the passage of the Enabling Act if no indictment had been found therein at the time of the passage of the act, to be tried in the Federal courts.

It is furthermore to be observed that, while contending for a literal construction of section 14, the appellant, on page 13 of his brief, recognizes the fact that section 14 is to be construed as referring simply to crimes and offenses arising under the Constitution, laws, or treaties of the United States, and not as

applying to all crimes or offenses committed in the Territories referred to during the periods mentioned.

The amendatory act of March 4, 1907 (*supra*), makes the purpose of Congress entirely clear. It was passed ten months after the act of June 16, 1906 (*supra*), and in it Congress specifically provides for the transfer to the Federal courts of "prosecutions for all crimes and offenses committed within the Territory of Oklahoma, or the Indian Territory, pending in the district courts of the Territory of Oklahoma, or in the United States courts in the Indian Territory, upon the admission of such Territories as a State, which, had they been committed within the State, would have been cognizable in the Federal courts" (amended sec. 16). Amended section 20 provides for the transfer to the courts of the State of "all causes, proceedings, and matters, civil and *criminal*, pending in the district courts of Oklahoma Territory or the United States courts in Indian Territory at the time said Territories became a State, not transferred to the United States circuit or district courts in the State of Oklahoma." The same amended section further provides that "all criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States circuit or district courts in the State of Oklahoma, shall be prosecuted to a final determination in the state courts of Oklahoma under the laws now in force in that Territory."

This amendatory act, which is merely a legislative declaration of the meaning of the original act in this respect, clearly shows that Congress contemplated that the district courts of Oklahoma Territory and the United States courts of the Indian Territory were continuing and would continue to exercise the jurisdiction to try and determine both civil and criminal cases until the admission of the State. *What need would there have been to provide for the transfer of criminal cases pending in the Territorial courts if, during the interim between the passage of the Enabling Act and the admission of the State, none could have been instituted?*

The real object of section 14 was to define the criminal jurisdiction of the circuit and district courts of the United States established by the preceding section and to provide for the prosecution, in their respective districts, of crimes and offenses committed prior to the admission of the State in which no indictments had been found. By subsequent sections Congress provided for the transfer, upon the admission of the State, of pending causes, civil and criminal. By this section it intended to provide for the prosecution of offenses committed before the admission of the State in which no indictments had been found, as well as offenses thereafter committed. The use of the words "passage of this act" was a clear inadvertence, and, under well-settled principles of construction, the section should be construed so as to carry into effect the real intention of Congress.

United States v. *Kirby*, 7 Wall., 482.
Oates v. *Bank*, 100 U. S., 239.
Lau Ow Bew v. *United States*, 144 U. S., 47.
Holy Trinity Church v. *United States*, 143 U. S., 457.
Lee Kan v. *United States*, 62 Fed., 914.
United States v. *Hogg*, 112 Fed., 909.
Tsoi Sim v. *United States*, 116 Fed., 920.

Under the provisions of the Enabling Act, considerable time necessarily must have elapsed before the State could be admitted. It provided for the election of a constitutional convention, the submission of the constitution so framed to the people for approval, and, finally, the approval of the constitution and the proclamation of the result of the election by the President (secs. 2, 3, 4). Under the restrictions imposed by Congress this necessarily would require several months, and, as a matter of fact, did require seventeen months. Moreover, the admission of the State was entirely problematical, and it might in fact yet have remained unadmitted, as is the case with the Territories of Arizona and New Mexico, whose admission as a State was provided for in the same act. The contention that Congress intended to suspend the prosecution of criminal offenses committed in the Indian Territory and Oklahoma Territory after the passage of the enabling act, as well as those committed before the passage of that act for which indictments had not been found, until the State was, if ever, admitted is so absurd as to offend the reason.

The memorandum decision by Judge Pollock presents a concise and convincing exposition of the matter. Referring to the provision of section 13 of the act that the State, "when admitted as aforesaid," should constitute two judicial districts, he said (Rec. 14):

> From this and other language contained in the act, and from the object and purpose sought to be accomplished by it, I am of the opinion the true construction of section 14 of the act requires the holding that it was not a present vesting of judicial power, but a provision for the vesting of judicial power upon the happening of a certain contingency; that is, the actual admission of the Territory as a State and the creation of the courts therein provided for on the happening of such contingency. That until such time the provision in question remained in abeyance. That the power and jurisdiction of the United States Court for the Northern District of the Indian Territory, through its grand jury therein empaneled, remained to inquire of the offense with which petitioner stands convicted, at the time such inquiry was made, that such court possessed full power and jurisdiction to try petitioner for such offense, and that such jurisdiction and power remained in said court to inquire into offenses committed in said Territory, cognizable by said court, after the passage of the act in question, until the admission of the state of Oklahoma became an accomplished fact.
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> As bearing upon this question in principle, see *Freeborn* v. *Smith* (2 Wall., 160); *Benner*

et al. v. *Porter* (9 How., 235); *Calkin and Company* v. *Cocke* (14 How., 237).

II.

The second error assigned as the ground for the issuance of the writ of habeas corpus is that the place of imprisonment was improperly designated. Under the order of the court (Rec. 9) Childers was sentenced to be imprisoned in "the penitentiary *situated* at Fort Leavenworth, Kans." He contends (Rec. 3) that on the 1st day of February, 1906, the United States penitentiary at Fort Leavenworth, Kans., was returned to the War Department, and that the Attorney-General thereafter designated the "United States penitentiary at Leavenworth, Kansas," as the place of confinement of prisoners of the class of petitioner.

There was no error in the judgment or committal. As a matter of fact, of which this court may take judicial notice, "the United States penitentiary at Leavenworth, Kansas," is situated on the military reservation at Fort Leavenworth, Kans., and there is no United States penitentiary at Leavenworth, Kans. What the petitioner alluded to was this: By the sundry civil act of March 2, 1905 (28 Stat., 957), the military prison at Fort Leavenworth, Kans., including all the buildings, grounds, and other property connected therewith, was transferred from the War Department to the Department of Justice, to be known and used as a United States penitentiary. By the act of June 10, 1906 (29 Stat., 380), Congress

authorized and directed the Attorney-General to select, on the military reservation at Leavenworth, Kans., a site for the erection of a new penitentiary and other buildings, and provided that, when such penitentiary should be occupied and applied to the purposes contemplated by the act, the buildings and grounds comprising the old penitentiary should be restored to the Department of War. It will thus be seen that the present United States penitentiary is, as stated in the judgment of the court, *situated* at Fort Leavenworth, Kans., although it is generally referred to as "the United States penitentiary at Leavenworth, Kansas," in order to distinguish it from the military prison which is also maintained at Fort Leavenworth.

The alleged error in designating the place of imprisonment would not invalidate the judgment, and is therefore not a proper subject of review on habeas corpus.

Ex parte Waterman, 33 Fed., 29.
Church on Habeas Corpus, sec. 365, n. 9.
People v. *Kelley*, 32 Hun., 536.
Ex parte Simmons, 62 Ala., 416.
Ex parte Bond, 9 S. C., 80.
People v. *Cavanagh*, 2 Parker Cr. C., 650.

In re Bonner, 151 U. S., 242, and *In re Christian*, 82 Fed., 204, relied on by appellant, are not in point. In both those cases the petitioners had been sentenced to the *penitentiary* for an offense which was only punishable by imprisonment in *jail*. Here the appellant had been convicted of and sentenced for a penitentiary offense.

III.

The third ground of the petition is not pressed in appellant's brief. The petition alleges that it appears from the exhibits attached thereto that judgment was pronounced upon the day the verdict was rendered, and it does not appear therefrom that the petitioner consented to the imposition of the judgment at that time. It should be observed, however, that the petition does not allege that he did not so consent.

It is well settled that such a question is not reviewable on habeas corpus.

Church on Habeas Corpus, sec. 364.
Ex parte Smith, 2 Nevada, 338.
In re Barton, 6 Utah, 264.
Ex parte Mess, 12 Pac. Coast L. J. (Cal.), 279.

The appeal should be dismissed for want of jurisdiction or the judgment of the District Court affirmed.

WILLIAM R. HARR,
Assistant Attorney-General.

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